DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-201588 **DATE:** March 8, 1983

MATTER OF: Per Diem Allowances - Temporary Duty at Andros Island, Bahamas - Reconsideration

DIGEST: 1. Navy activity directive establishing a $10 per diem rate for employees performing temporary duty at installation on Andros Island, Bahamas, based on normal cost of quarters and meals furnished to employees was upheld in B-201588, March 25, 1981. In appealing from that decision, claimants argued that Navy activity failed to comply with paragraph C8050-1, 2 JTR (currently paragraph C4450-1b, 2 JTR), which requires agency officials to obtain advance approval from PDTATAC before setting per diem at a rate different from rates prescribed in JTR. Original decision is affirmed since $10 per diem rate was prescribed in accordance with JTR and advance approval was unnecessary since paragraph C8101-3f is itself authority to establish specific per diem rate.

2. Pursuant to paragraph C8101-3f, 2 JTR (currently paragraph C4552-3f, 2 JTR), Navy activity had authority and responsibility for issuing directive establishing special rate of per diem for temporary duty to Andros Island, Bahamas, based on determination that commercial establishments which prepare and serve meals were unavailable. Determination of availability of commercial establishments was matter within discretion of appropriate officials of the Navy activity. Absent clear evidence that Navy officials abused discretion, GAO will not question conclusion that commercial establishments were unavailable.

This action is in response to a letter dated July 12, 1982, from Joseph P. Donovan, Jr., Esquire, of the National Association of Government Employees requesting reconsideration of our decision in B-201588,

March 25, 1981, in which we determined the rate of per diem payable to certain civilian employees of the Naval Underwater Systems Center (NUSC), Newport, Rhode Island. The request for reconsideration is accompanied by several enclosures including additional evidence and the requisite powers of attorney which authorize Mr. Donovan to act on behalf of four civilian employees of the Navy who were affected by our original decision.

Our original decision upheld the validity of an NUSC administrative instruction which prescribed a rate of per diem other than the rate generally authorized under Volume 2 of the Joint Travel Regulations (2 JTR). Mr. Donovan takes exception to that decision on a number of grounds. However, having reconsidered our decision in light of the additional evidence and arguments raised by Mr. Donovan, we can find no compelling basis for reversing our holding in this matter. Our reasons are set forth below.

The primary issue raised in this reconsideration is whether employees of the NUSC who performed temporary duty assignments at various times after December 1, 1974, at the Navy's Atlantic Undersea Test and Evaluation Center on Andros Island, Bahamas, were entitled to receive per diem in excess of that prescribed in an NUSC administrative instruction. The administrative instruction in question, NUSCINST 4600.2, was issued on November 27, 1974, and specified that the per diem rate for employees performing temporary duty at the Andros Island installation would be $10 effective December 1, 1974. The $10 per diem rate was based on the daily charges for quarters and meals furnished to the employees at the installation.

Mr. Donovan contends that NUSC Instruction 4600.2 was invalid because "the commanding authority failed to have it approved." In support of this contention, he cites 2 JTR paragraph C4550-1b (formerly paragraph C8050-1) which requires the agency official responsible for directing travel to obtain advance approval from the Per Diem, Travel and Transportation Allowance Committee before substituting a lower rate of per diem for the rate of per diem authorized by the JTR. This argument erroneously assumes that the rate prescribed in the NUSC instruction was not authorized by the JTR.

As explained in the original decision, regulations which implement the applicable law governing travel of civilians employed with the Department of Defense, are contained in Volume 2 of the JTR. Prior to December 1, 1974, the regulations prescribed a general seasonal per diem rate for Andros Island, Bahamas, coupled with a formula for reducing that rate for travelers utilizing quarters and messing facilities provided by a Government contractor. Effective December 1, 1974, 2 JTR was amended to add paragraph C8101-3f, which directed local command authorities to establish a per diem rate for employees who use Government quarters or Government contractor lodging facilities at a temporary duty station where commercial food establishments are not available, commensurate with the normal cost of Government-procured food and lodgings furnished to the employees at the installation. That paragraph has remained a part of the regulations, with slight modifications, since December 1974 and currently appears as paragraph C4552-3f.

Under the pertinent provisions of the JTR, the Naval authorities having command over the Andros Island installation had both the authority and the responsibility to issue an administrative instruction establishing a special per diem rate effective December 1, 1974, for employees performing temporary duty at the installation based on the normal cost of quarters and meals furnished to the employees there. In this regard, the appropriate authorities at NUSC had determined that commercial facilities were not available in the immediate vicinity of the installation, and that employees were furnished Government-procured quarters and meals. NUSCINST 4600.2 reflects this determination and establishes a rate in conformance with 2 JTR, paragraph C8101-3f. Since paragraph C8101-3f is itself authority to prescribe a specific per diem rate, advance approval from the Per Diem, Travel and Transportation Allowance Committee was not required under 2 JTR, paragraph C8050-1.

Additionally, Mr. Donovan argues that commercial food establishments were available to employees at the Andros Island installation and that the command authorities at NUSC erroneously concluded that they were unavailable. He claims that the erroneous determination of the NUSC officials is evidenced in NUSC Instruction 4600.2A of June 14, 1979, the order which superseded NUSC Instruction 4600.2.

Instruction 4600.2 stated that the:

> "* * * snack bar [on Andros Island] known as the 'Port Hole' is determined not to be a 'commercial establishment that prepares and serves food' as defined within the context of the regulations."

Instruction 4600.2A, on the other hand, stated that the "recreational facilities * * * such as the 'Port Hole' and the 'Beach House' * * * are considered commercial establishments."

Pursuant to the provisions of the JTR, the determination of whether commercial establishments which prepare and serve meals are available at or within a reasonable distance from the temporary duty station is for the order authorizing or authenticating official. This is not a determination which our Office will question absent evidence that the agency was arbitrary or capricious or that it abused its discretion. We cannot agree with Mr. Donovan's suggestion that the language of NUSC Instruction 4600.2A characterizing the "Port Hole" and the "Beach House" as commercial establishments necessarily indicated that NUSC Instruction 4600.2 issued 3-1/2 years earlier arbitrarily or capriciously failed to give the same characterization to the two facilities. In fact, a report received in 1980 from the commanding officer, NUSC, states that "meals may be obtained outside the Government Facility, but until several years ago, these sources of food were not considered a practical or adequate alternative to the Government Facility."

We are also unpersuaded by Mr. Donovan's contention that NUSCINST 4600.2 was promulgated improperly and, therefore, was invalid. In this argument he depends on the following: the requisite notation citing NUSCINST 4600.2 was omitted from Block 13 of the official travel orders of the four NUSC employees in question; the disbursing officer who was responsible for enforcing NUSCINST 4600.2 allegedly expressed ignorance of the regulation during a conversation with one of the claimants; and, travel vouchers submitted with the request for reconsideration show that another Navy facility located in Keyport, Washington, which was subject to the same NUSC instruction failed to apply the instruction to the travel orders of two employees who had traveled

to Andros Island from Keyport. We do not find that these administrative errors and omissions invalidate the instruction or entitle individual travelers to per diem in excess of that authorized by the instruction. The errors and omissions in question involved misapplication or nonapplication of a valid NUSC instruction and we know of no authority for the proposition that failure to adhere to a properly issued directive renders it invalid or otherwise inapplicable. Accordingly, our original decision in this matter is affirmed. The claimants are entitled to per diem at the rate prescribed in NUSC Instruction 4600.2, and payment may not be made on the employees' claims for additional per diem.

Milton J. Socolar

for Comptroller General
of the United States